83-328

No. ____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1983

James Mabry, Commissioner
Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON — PETITIONER

VS. — CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction — RESPONDENT

JUDGMENT

Pursuant to the Order entered this date, it is Adjudged that the petitioner's petition for a writ of habeas corpus be, and it is hereby, dismissed.

DATED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas Department of Correction RESPONDENT

ORDER

The Court has received a Report with Recommended Findings and Conclusions from Magistrate Henry L. Jones, Jr. After careful review of those Findings and Conclusions, the Court adopts them in their entirety.

THEREFORE, IT IS ORDERED that the petitioner's petition for a writ of Habeas Corpus is dismissed.

IT IS SO ORDERED this 16th day of September, 1980.

/s/ William R. Overton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GEORGE JOHNSON PETITIONER

VS. CASE NO. PB-C-78-139

JAMES MABRY, Director, Arkansas
Department of Correction RESPONDENT

REPORT WITH RECOMMENDED
FINDINGS AND CONCLUSIONS

The petitioner, an inmate of the Arkansas Department of Correction, was convicted by a jury on November 23, 1970, of murder in the first degree and was sentenced to a term of life imprisonment. On June 15, 1971, he was found guilty of burglary and assault with intent to kill and sentenced to twenty-one years. These charges arose from the same incident for which petitioner received the life sentence. Petitioner's conviction of first degree murder was subsequently reversed by the Arkansas Supreme Court due to the trial court's failure to give a requested jury instruction. *Johnson v. State*, 252 Ark. 1113 (1972). On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to a term of twenty-one years, to run consecutively to the twenty-one year sentence he was serving for burglary and assault with intent to kill.

Petitioner sought post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure alleging ineffective assistance of counsel and coerced guilty plea. The Pulaski County Circuit Court denied petitioner's request for post-conviction relief and, in an unpublished opinion, the Arkansas Supreme Court affirmed on June 5, 1978. He then filed a petition for a writ of habeas corpus under 28 U.S.C. §2554.

Petitioner alleges that his confinement is unconstitutional for two reasons:

> (1) His plea of guilty was unlawfully induced and not made voluntarily, since he did not understand the nature and consequence of the plea and accepted the offer of twenty-one years only after being threatened by counsel; and
>
> (2) He was denied effective assistance of counsel in that his appointed counsel only talked with him for ten minutes, did not explain the nature and consequences of a plea of guilty, did not interview any witneses, and did not discuss his version of the facts with him.

The respondent admits that the petitioner has exhausted his state remedies as to these grounds as required by 28 U.S.C. §2554 (b).

In that this is a habeas corpus proceedings, the findings of the state trial court are presumptively correct unless (1) the merits of the factual dispute were not resolved in the state court hearing; (2) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (3) the material facts were not adequately developed at the state court hearing; (4) the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding; (5) the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding; (6) the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; (7) the applicant was otherwise denied due process of law in the state court proceeding; (8) or unless, on the record as a whole, the federal court concludes that the factual determination by the state court is not fairly supported by the record. 28 U.S.C. §2554 (d).

Here the presumption applies because the record reveals that none of the above circumstances exist. In a case

where the district court had granted habeas relief, the Eighth Circuit made the following comments:

> The federal district court in fact relied upon the exact testimony taken in the state proceeding. The federal district judge made no finding that the 1952 state court factual determination was *not* supported by the record. Under these circumstances, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous." *See* §2554 (d).

In Re Parker, 423 F.2d 1021 (8th Cir.); *cert. denied*, 398 U.S. 966 (1970).

The following review of the facts by the Arkansas Supreme Court in its reversal of Johnson's conviction, sets the background for the issues addressed herein.

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki arrived home from the Siscoe grocery store on the night of May 22, 1970, at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband, who followed her in a vehicle driven by the husband. He stopped his car and the daugher got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38-caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22-caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38-caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the

> time, and W.A. Siscoe were wounded. All three wounded persons were admitted to Baptist Medical Center, where Vicki Siscoe died.
>
> Fingerprints lifted from the .22 caliber pistol were not Johnson's. There was obvious evidence of a forcible entry into the house by the breaking of a window and the removal of a window screen. The ransacking of dresser drawers and the opening of two piggy banks therein were clear indications of larcenous intent of at least one of the intruders. Fingerprints lifted from the windowsill were not Johnson's. (Footnote omitted)

252 Ark. at 1114, 1115.

An evidentiary hearing was held on August 22, 1979, in Pine Bluff, Arkansas. Petitioner was present and testified, as did three other witnesses. Petitioner was represented by Richard Quiggle, appointed by the Court. The respondent was represented by Assistant Attorney General Dennis Molock.

After an initial report with recommended findings and conclusions was submitted to the Hon. William R. Overton, the case was remanded to this magistrate for the consideration of additional evidence.

The testimony at trial established that shortly after petitioner's conviction for murder was reversed by the Arkansas Supreme Court, the Public Defender's office was appointed to represent him in the person of Harold Hall. Mr. Hall was offered a plea proposal by the prosecutor on October 27, 1972, and he communicated the offer to the petitioner the next day, a Saturday. The prosecutor offered petitioner a twenty-one year sentence, to be served concurrently with the twenty-one year sentence he was serving for burglary and assault, in exchange for petitioner's plea of guilty to the charge of accessory after a felony murder. Petitioner accepted the offer and Mr. Hall called the prosecutor on the following Monday and communicated petitioner's ac-

ceptence of the offer. At that time, the prosecutor withdrew his offer saying that a mistake had been made. Mr. Hall then assigned the case to John Achor and told him to tell petitioner that the plea bargain had been withdrawn.

On November 8 and 9, 1972, petitioner appeared in Pulaski County Circuit Court for trial; on November 9, a mistrial was declared and the jury excused. The trial was reset for December 7 and 8 and later continued to February 26, 1973. On February 26, 1973, petitioner entered a plea of guilty to the charge of accessory after a felony murder and was sentenced to twenty-one years to be served after the expiration of the twenty-one years he was then serving for burglary and assault.

The petitioner launches a two-pronged attack on his guilty plea. He contends that although he knew the original offer had been withdrawn, he did not then and does not now understand the difference between the terms consecutive and concurrent and that when he pled guilty he thought that he would receive a sentence of twenty-one years which would "run with" the sentence he was then serving. In essence, he thought he was getting what had been offered him before. He also contends that he pled guilty because Mr. Achor had threatened him with a life sentence if he went to trial and because several important witnesses were not present for the trial.

As to petitioner's first attack on his plea, it is well settled that a guilty plea will be set aside if the defendant who has agreed to the terms of a plea bargain does not receive the benefit of that bargain. *Blackedge v. Allison*, 431 U.S. 63 (1977); *Coney v. Wyrick*, 532 F.2d 94 (8th Cir. 1976). A defendant's mistaken subjective impressions, however, "gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea." *U.S. ex rel Curtis v. Zelker*, 466 F.2d 1092 (2nd Cir. 1972), *cert. denied*, 410 U.S.

945 (1973); see *Griffith v. Wyrick*, 527 F.2d 109 (8th Cir. 1975). "The voluntariness of the plea depends on the subjective mind of the petitioner but the resolution of the factual issue most often must be determined by the objective evidence." *Ford v. U.S.*, 418 F.2d 855 (8th Cir. 1969).

The record in this case supports the conclusion that the petitioner was aware of the sentence he would receive and, thus, his alleged mistaken belief was not reasonably justified. Before petitioner's plea was taken, the circuit court judge made the following statement to the prospective jurors in the petitioner's presence: "He's agreed to take twenty-one years on top of the twenty-one he's got which will make a total of forty-two years." Bill of Exceptions, p. 3. The judge later remarked, "As I understand it, what he wants to do is plead guilty and take twenty-one years and this twenty-one year sentence is to commence at the expiration of the sentence he's got in the burglary count." Bill of Exceptions, p. 4. It may be true that the petitioner did not and does not now understand the terms concurrent and consecutive, and did not understand the use of the word "expiration" in the court's second statement. This Court must, however, credit the testimony of Mr. Achor [1] given the state court judge's quoted first statement in the presence of the petitioner. The evidence does not, therefore, convincingly show that the petitioner's alleged mistaken belief was reasonably justified.

In petitioner's second attack on his guilty plea, he argues that the plea was the result of unlawful inducement. He asserts that Mr. Achor threatened him with a life sentence if he went to trial and that he could not proceed to

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Mr. Achor testified that he discussed in detail with petitioner the fact that he was receiving a total of forty-two years and attempted to compare that with the life sentence he believed might result from a trial of the case.

trial because several important witnesses were not present and he, therefore, had no choice but to plead guilty.

When a defendant enters a guilty plea, there must be an affirmative showing on the record that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea is an admission and a waiver of the right to a trial before a judge or jury. "Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. U.S.*, 397 U.S. 742 (1970). That the guilty plea was motivated by the fear of the possibility of a heavier sentence does not necessarily prove that "the plea was coerced and invalid as an involuntary act." *Brady*, supra, at 750. The Supreme Court in *Brady*, adopted the following standard from *Shelton v. U.S.*, 242 F.ed 101 (5th Cir.), aff'd., 246 F.2d 571 (1957) (en banc), rev'd on confession of error on other grounds, 356 U.S. 26 (1958):

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentations (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business.

Brady, supra, at 755.

Mr. Achor testified that as a result of his view of the transcript of the first trial and his investigation, he did communicate to the petitioner that he believed if the case went to trial he would be convicted and receive a life sentence. Whether or not the facts surrounding the "threat" of a life sentence by his counsel or the missing witnesses, as discussed later in relation to the issue of ineffective assistance of counsel, or the fact that the

petitioner had shown the willingness to go to trial on three earlier occasions, met the standards required to show a coerced guilty plea, the Court need not decide. The petitioner has placed the Court in an almost impossible situation. Although he has not shown that his alleged mistaken belief that he was to receive a twenty-one year concurrent sentence was reasonable, the Court cannot in the face of that assertion and his testimony rule that he has shown by convincing evidence that his plea was the result of unlawful inducement or coercion. The petitioner and Mr. Achor testified that the twenty-one year concurrent sentence was what the petitioner wanted. The petitioner testified that he thought that was what he received and that he was satisfied until the officials at the prison gave him his time card showing a forty-two year sentence, subsequent to this arrival there. Yet, the petitioner would have the Court reject that testimony totally and find that his plea was coerced. It is sometimes appropriate and necessary for parties to plead alternative theories for relief. However, when a party presents logically inconsistent factual assertions in support of those legal theories, he requires the court, in order to give relief, to reject a complete and logical set of factual assertions in favor of another complete and logical set. This the Court is unwilling to do. Thus, the petitioner's assertions as to his belief concerning the twenty-one year concurrent sentence preclude the finding urged in his coreced plea argument.

The petitioner alleges that he was denied effective assistance of counsel. The standard in the Eighth Circuit in evaluating a petition alleging ineffective assistance of counsel is well established.

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonable competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). There is a

> presumption that counsel has rendered effective assistance. *Thomas v. Wyrick*, 535 F.2d 407, 413 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned (sic) by the defense attorney to his client, and (2) that the failure prejudiced the defense. *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974).

Dupree v. U.S., 606 F.2d 829, 830 (8th Cir. 1979).

The Court is convinced that Mr. Achor failed to perform an essential duty owed to the petitioner. [2] Although the Court finds that Mr. Achor reviewed the transcript of the previous trial and the subsequent Supreme Court opinion, talked with the petitioner and interviewed the victim's father and the police officer, his failure to attempt to locate and interview Eddie Jackson, [3] Lacey Gordon and Benny Kelly compels this conclusion.

The failure to interview prospective witneses may be a breach of the duty to act as a reasonably competent attorney. *U.S. v. McMillan*, 606 F.2d 245 (8th Cir. 1979); *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974). Under the circumstances of this case, petitioner's attorney breached that duty. The petitioner was charged by information with murder in the first degree in that he feloniously caused the death off Vicki Siscoe while perpetrating a burglary. The requested but rejected

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Although the petitioner alleges other facts to support his ineffective assistance of counsel argument, the court considers those allegations to be without merit.

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Mr. Achor's testimony was that he did not remember interviewing Jackson.

instruction which resulted in the reversal of petitioner's conviction dealt with the standard under which his responsibility for the acts of his alleged companion, Eddie Jackson, was to be judged. That instruction reads:

> In order that one may be guilty of a homicide, the act must be done by him actually or constructively, and that cannot be unless the crime be committed by his own hands or by the hands of someone acting in concert with him, or in furtherance of a common object or purpose.

Johnson v. State, supra, at 1119.

Although Johnson was identified by the victim's father as the person with whom he exchanged fire, Johnson testified at trial that Eddie Jackson, Lacey Gordon and Benny Kelly accompanied him to the Siscoe's home and that Jackson gained entry through a window and let him in. He stated that "he did not enter the Siscoe house with the intent to commit larceny and did not know that his companion, Jackson, had any intention to do anything there except collect some money due him, until Jackson broke a window to gain entrance". *Johnson v. State*, at 1118. Gordon and Kelly apparently never entered the home. Johnson also testified that Jackson had a gun and he did not.

The testimony of Mr. Earl Evan Harris, III, Chief of Records and Identification for the Arkansas Department of Correction, indicates that Eddie Jackson was an inmate of the Cummins Unit during the period that petitioner's attorney was investigating this case. Although there was no evidence presented as to where Gordon and Kelly were at that time, petitioner's attorney made no attempt to locate and interview them. These potential witnesses were crucial in any attempt to find evidence supporting the petitioner. Thus, the petitioner has established the breach required in the first steps of the Court's analysis.

Two hearings have been held since the remand from Judge Overton. Evidence was presented on the issue of prejudice to the petitioner as a result of the breach of duty found by the court. In supplemental hearings it was established that Eddie Jackson was unavailable for the initial hearing in this court and remains unavailable because of an outstanding warrant for his arrest for parole violation.

Petitioner testified that on the night of the incident which led to his guilty plea, Benny Kelly, driving Eddie Jackson's car, "dropped Lacey Gordon off" before they proceeded to the Siscoe home. The purpose of going to the Siscoe home was to collect money that Mr. Siscoe owed Jackson.

Lacey Gordon testified that he had known Benny Kelly and George Johnson all of his life and he had met Eddie Jackson a couple of times. Lacey Gordon, however, remembered no involvement with George Johnson, Benny Kelly or Eddie Jackson on the night of the shooting. He did not remember ever riding in a car with all three of them on any occasion. He heard about the indictment "on the street" and was never contacted to testify in George Johnson's trial. The petitioner's attorney offered as evidence notes taken by him of his telephone interview with Gordon before the supplemental hearings. These notes were intended to show that Gordon's testimony differed from the statement given petitioner's attorney. Although the notes present a hearsay problem, if for impeachment purposes petitioner's counsel withdrew from the case and the notes were admitted under the business recor d exception or if for the same purpose the petitioner's attorney after withdrawing testified concerning his conversation with Gordon, petitioner's cause would not be advanced. Such testimony would not allow a conclusion that it was available at the time of petitioner's state court trial and thus prejudice could not be shown in this manner. The credibility of the witness is simply destroyed and no basis is left for finding that testimony helpful to the petitioner was available. In

addition, Benny Kelly also testified that he had no knowledge of the Siscoe incident except from talk "on the street." The petitioner argues, however, that the denials of Kelly, Gordon and without doubt Jackson would have advanced the petitioner's case.

> He could have testified as he did, called these three to deny any involvement, or more likely to take the "Fifth" and his counsel could have argued to the jury that these denials, or non-responses, clearly showed their involvement.
>
> The argument may have been unsuccessful, but there is no requirement that petitioner show the potential success of his defense. He need only show that the evidence might have been helpful. *McQueen, supra.*

Petitioner's Burden of Proof Memorandum, p. 4.

The standard in *McQueen* is that the evidence *would* have proved helpful. This the Court does not find. Although,

> where the defendant enters a guilty plea, the issue of prejudice necessarily centers upon whether the attorney's failure to completely investigate any material facts prejudice the defendant's ability to make an intelligent and voluntary plea of guilty.

Ford v. Parratt, 638 F.2d 1115, 1118 (8th Cir. 1981), this Court does not find that the denial of involvement or knowledge of the incident by Gordon and Kelly would have affected the petitioner's decision to plead guilty.

Thus, petitioner is left with the argument that the unavailability of George (sic) Jackson is a changed circumstance beyond his control which shifts the burden to the state of showing the absence of prejudice. *McQueen v. Swenson*, 498 F.2d 207, 220 (7th Cir. 1974). A literal reading of *McQueen* would require finding that the burden has shifted to the state. Here, however, the *McQueen* holding

does not apply. Both counsel assert and the court agrees that it would be unreasonable to assume that Jackson's testimony would differ from that of Gordon and Kelly. Although Jackson's actual testimony is unavailable because of circumstances beyond the control of the petitioner the testimony itself would not aid the petitioner. This may be a unique circumstance where the burden-shifting doctrine of *McQueen*, if applied, would place the petitioner in a better position than if the witness were able to testify in this habeas proceeding. That is a result which this Court does not believe the *McQueen* Court intended.

The petitioner has not shown, therefore, that he was prejudiced by the failure of his counsel to interview the three witnesses. He has made no showing that the testimony of Jackson, Gordon or Kelly would have supported his position, and for the Court to assume that fact and thus to assume prejudice would be error. See, *U.S. v. Davis*, No. 79-1758 (8th Cir. Feb. 17, 1980).

The petitioner raised an additional constitutional challenge after the initial hearing in this matter. It is undisputed that the prosecutor communicated an offer of a twenty-one year sentence, to run concurrent with the twenty-one year sentence petitioner was serving for burglary and assault in exchange for a plea of guilty to a reduced charge of accessory after a felony murder. It is also undisputed that this offer was communicated to and accepted by the petitioner, and that the offer was subsequently withdrawn by the prosecutor for the apparent reason that a mistake had been made. The petitioner argues that the withdrawal of the offer after acceptance violated his constitutional rights and that he has a constitutional right to the enforcement of that bargain.

The respondent argues that the petitioner has failed to exhaust this ground and thus the Court should not address the issue. Although the petitioner did seek post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure, he did not raise this issue.

Rule 37.2 (b) states:

> All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

The Arkansas Supreme Court has held that a petitioner is not entitled to file a second petition for relief. *Winberry v. Ark.*, 265 Ark. 65 (1974). *See also, Witham v. Mabry*, 596 F.2d 293 (8th Cir. 1979).

There is no indication that the Arkansas Supreme Court would consider a second petition under Rule 37. The petitioner, thus, has exhausted his remedies.

Although the issue of the withdrawn offer was not raised until after the hearing, the facts are not disputed and the Court will address the issue on its merits. Since the Supreme Court decided *Santobello v. New York*, 404 U.S. 257 (1971), fairness in the plea bargaining process has been viewed as having constitutional dimensions. In almost all decisions, however, the right of the defendant to enforce a plea bargain has been limited to situations in which the defendant has entered his plea of guilty. The petitioner here asserts that the withdrawal of the offer after only his acceptance is fundamentally unfair and requies enforcement by the Court of the bargain. [4]

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[4] The petitioner also asserts that the failure of his counsel to attempt to enforce the plea bargain in Court deprived him of effective assistance of counsel. The Court finds this assertion to be without merit.

In *Cooper v. United States*, 594 F.2d 12, 18 (4th Cir. 1979), the Court found a right to enforcement of plea bargains before entering a guilty plea " . . . under appropriate circumstances . . . and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." The sources of the constitutional rights found by the Fourth Circuit are the rights to fundamental fairness embraced within substantive due process guarantees and the right to effective assistance of counsel.

In explaining the application of the right to effective assistance of counsel in the context of a withdrawn offer by government, the court stated:

> To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability are necessarily jeopardized and the effectiveness of counsel's assistance easliy compromised. At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas. Footnote omitted.

Cooper at 18, 19.

The elements crucial to the Cooper court's holding were the specific and unambiguous form of the government's proposal; the reasonable context of the proposal in specific context; the apparent or actual authority of the prosecutor at the time; the prompt communication to the defendant; the prompt and unequivocal assent by the defendant; the prompt communication of acceptance to the government; and the lack of extenuating circumstances affecting the government's or any public interest unknown when the proposal was extended.

In *Virgin Islands v. Scotland*, No. 79-1188 (3rd Cir. Feb. 1980), the Third Circuit declined to follow the *Cooper* rationale. Although it found that Cooper was so factually similar to *Scotland* that alleged distinctions were spurious, the Third Circuit rejected both the Sixth Amendment and due process findings of the Fourth Circuit. As to effective assistance of counsel, the Third Circuit after noting the court in *Cooper* observed that the prosecutor made the offer without any attached condition, reasoned:

> It reasonable to extrapolate that defense counsel could have a duty to inform his client that an offered proposal is conditional if the prosecutor had so informed him. Thus, according to the *Cooper* rationale, defendant's knowledge of such a contingency would remedy the ineffective assistance of counsel claim. As a practical matter it may be presumed that the government in the Fourth Circuit will make only conditional offers to defendants. If this type of "conditional" offer was not alone sufficient under the *Cooper* holding, the next logical step would be for a court to inquire as to whether the condition that the prosecutor cites is a legitimate one or one simply to avoid the holding of *Cooper*. Given the established breadth of prosecutorial discretion at all stages of the criminal process, particularly in charging and plea negotiation, see *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), this type of inquiry would appear to be an invasion of that discretion. Although *Cooper* does not go that far, it does invade the province of the United States Attorney and there is potential for further questionable concrete invasions.

Scotland, supra, slip op. at 6, note 6.

> In addressing the due process issue, the Third Circuit found:
>
> **Although the contentions concerning prosecutorial discretion and the discouragement of pleas are persuasive, the availability of an alternative remedy for the defendant is the convincing factor for rejecting the *Cooper* rule.**

> If the defendant is not allowed to compel specific performance of a plea proposal, he may withdraw his tendered plea or refuse to consent to any new bargain proposed by the prosecutor. It may be argued that this "remedy" is insufficien t, particularly in cases where, as here, the government's acts were far from exemplary. However, the defendant is then entitled to his constitutional right to trial by jury. This fundamental right would be belittled if we held it to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain—if no offer is made, the defendant is entitled to a trial. There is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has. The courts cannot compel the prosecutor to offer a plea bargain to eliminate the resulting discrimination between these two types of defendants. There is no rule that dictates that the prosecutor may not simply let a case go to trial. In the case sub judice, Springette is in the same position as if he had not been offered a plea because no detrimental reliance is alleged. Thus we reject a *Cooper*-type rule that would allow specific performance of an unconsummated plea in the absence of such detrimental reliance because a jury trial on the charge is an adequate remedy.
>
> When, however, the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees. This basic estoppel principle was recognized by the Court in *Santobello*, when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled. *Santobello* arguably could be extended to cover the situation where the defendant has not yet entered the plea but has relied on the bargain in such a way that a fair trial would no longer be possible. There is no claim in this case of such reliance. Absent such reliance, we do not find the *Cooper* rule compelling. (Footnote omitted)

Scotland, supra, slip op. at 9.

The case sub judice is also factually similar to *Cooper* and the rationale used by the Fourth Circuit would apply. This Court, however, agrees with the compelling reasoning of the Third Circuit in *Scotland.*

THEREFORE, IT IS ORDERED that this petition be, and it is hereby dismissed with prejudice.

IT IS SO ORDERED this 27th day of August.

/s/ Henry L. Jones, Jr.
United States Magistrate

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 81-2181-EA	) September Term 1982
George Johnson,	)
Appellant,	)
	) Appeal from the
vs.	) United States District
	) Court for the Eastern
James Mabry, Commissioner,	) District of Arkansas
Arkansas Department of	)
Correction,	)
	)
Appellee.	)
	)
	)

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, John R. Gibson and Fagg would grant the petition for rehearing en banc.

June 30, 1983

CERTIFICATE OF SERVICE

I, Dennis R. Molock, hereby certify that a copy of the foregoing Supplemental Appendix has been served upon the respondent herein by placing a copy of the same in the U.S. Mail, postage paid, addressed to Richard Quiggle, Attorney at Law, 904 West Second St., P.O. Box 2651, Little Rock, Arkansas this 22nd day of September, 1983.

/s/ DENNIS R. MOLOCK